

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FILED/ACCEPTED
MAR - 5 2008
Federal Communications Commission
Office of the Secretary

In the Matter of) EB Docket No. 07-13
)
DAVID L. TITUS) FRN No. 0002074797
) File No. EB-06-IH-5048
Amateur Radio Operator and Licensee of)
Amateur Radio Station KB7ILD)

To: Richard L. Sippel
Chief Administrative Law Judge

ENFORCEMENT BUREAU'S
RESPONSE AND OPPOSITION TO DAVID TITUS' NOTIFICATION OF
WITNESSES FOR CROSS EXAMINATION

1. The Chief, Enforcement Bureau, by her attorneys, hereby provides this response and opposition to David Titus' Notification of Witnesses for Cross Examination, served on March 3, 2008 ("Titus Notification").

2. The Bureau notes as a preliminary matter that contrary to the assertion of Mr. Titus,¹ the appropriate evidentiary standard in the instant hearing proceeding is the "preponderance of the evidence" standard. The case cited by Mr. Titus, *Sea Island Broadcasting Corp. v. FCC*, 627 F.2d 240 (D.C.Cir.1980), for the proposition that a "clear and convincing" evidentiary standard applies, was implicitly overruled by the Supreme Court in *Steadman v. SEC*, 450 U.S. 91, 95 (1981). Thus, the Commission has long since recognized that the "preponderance of the evidence" standard is the applicable standard in adjudicatory hearings before the Commission. See *Fox River Broadcasting, Inc.*, 88 FCC 2d 1132, 1136 (Rev.Bd.1982).

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¹ Titus Notification at p. 1.

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3. Following the exchange of notifications for cross examination and after discussions with Bureau counsel, Mr. Titus' counsel informed Bureau counsel that Mr. Titus has decided *not* to call Bureau witnesses Christopher Imlay and Sarah Walker for cross examination at the hearing. In addition, counsel for Mr. Titus and the Bureau have agreed that all remaining out-of-town witnesses noticed for cross examination -- with the exception of Mr. Titus and Seattle Police Detective Robert Shilling -- may, with the Presiding Judge's approval, testify on cross examination via speakerphone. Notwithstanding the foregoing, the Bureau reserves the right to seek to require the personal appearance of any rebuttal witnesses that Mr. Titus may proffer.

4. Bureau counsel opposes the Titus Notification to the extent that Mr. Titus seeks to cross examination individuals whom the Bureau is not offering for direct examination. For example, the Titus Notification, at p. 8, seeks to cross examine at hearing David Condon when the Bureau has not offered Mr. Condon for direct examination. Similarly, the Titus Notification, at p. 7, seeks to cross examine "any and all persons who provided information upon which Detective Shilling relied in raising Mr. Titus' sex offender status to level 3" when the Bureau has not offering any such persons for direct examination. The Bureau submits that the Commission's procedural rules do not contemplate cross-examination of persons who have not provided direct testimony.

5. The Bureau also objects to the Titus Notification, at p. 8, to the extent that it seeks through cross examination to apparently engage in further discovery in this proceeding. Specifically, Mr. Titus seeks to have Detective Shilling produce under the guise of cross examination various documentary materials beyond those which the Bureau is offering in its direct case. The Bureau notes that the discovery phase in this

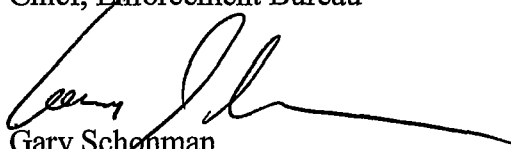
proceeding has concluded.² During the discovery phase, Mr. Titus had the opportunity to depose Detective Shilling and to solicit documentary materials from him. Having decided for whatever reason to forego such discovery, Mr. Titus should not now be permitted to solicit such materials at trial. Detective Shilling's direct testimony has been reduced to writing as contemplated by the Commission's rules, and Mr. Titus' cross examination should be limited in scope to the matters about which Detective Shilling provides in his direct testimony. Furthermore, Detective Shilling is primarily a fact witness who also is a recognized expert in the area of convicted sex offenders and their risk of re-offense. He is not a paid expert retained or employed by the Enforcement Bureau and therefore no report is required by Federal Rule of Civil Procedure 26(a)(2)(B). Detective Shilling does, however, meet the standard set forth in *Daubert v Merrel Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993), as he does have special expertise that will aid the Commission in rendering an appropriate decision in this case.

6. The Titus Notification, at pp. 2-3, also offers a number of premature objections to the Bureau's documentary exhibits, including those relating to the popularity of amateur radio to children. The Bureau intends to address such objections fully when it moves such exhibits into evidence. However, to the extent it may do so on a limited basis now, the Bureau notes that Mr. Titus correctly indicates that the Bureau asserted in its answers to interrogatories that it did not believe the matter of the popularity of amateur radio to children to be in issue in this proceeding. The Bureau also asserted as much at the September 19, 2007, prehearing conference in this case. TR. 154-157. The Presiding Judge, however, disagreed and provided a "heads up" that he anticipates the

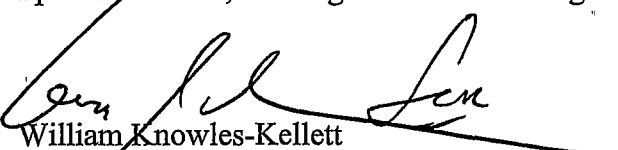
² See *Order*, FCC 07M-46 (setting forth procedural dates, including February 22, 2008, as the date for conclusion of all discovery).

introduction of evidence at the hearing in this proceeding on the subject of the popularity of amateur radio to children. Tr. 157-158. The Bureau thereafter supplemented its response to Mr. Titus' interrogatories to provide relevant evidence on the subject, and the documentary exhibits to which Mr. Titus now objects constitute those that the Bureau anticipates placing in the record regarding the popularity of amateur radio to children. In essence, the Bureau intends to offer these materials into evidence because the Presiding Judge expressed a desire for them.

Respectfully submitted,
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March 5, 2008

CERTIFICATE OF SERVICE

Karen Richardson, an Enforcement Analyst in the Enforcement Bureau's Investigations and Hearings Division, certifies that she has, on this 5th day of March, 2008, mailed copies of the foregoing "Enforcement Bureau's Response and Opposition to David Titus' Notification of Witnesses for Cross Examination" to:

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